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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CARL SCHAFER et al., Plaintiffs and Appellants, v. CITY OF LOS ANGELES, Defendant and Respondent.	B275385 Los Angeles County Super. Ct. No. BS137297

APPEAL from an order of the Superior Court of Los Angeles County, Robert H. O'Brien, Judge. Affirmed.

Rosario Perry and Steven A. Coard; Scafide Law Firm and James Francis Scafide for Plaintiffs and Appellants.

Michael N. Feuer, City Attorney, Terry P. Kaufmann Macias, Assistant City Attorney, and Amy Brothers, Deputy City Attorney, for Defendant and Respondent.

INTRODUCTION

Plaintiffs Carl Schafer and Elizabeth Leslie appeal from an order denying their motion for attorney fees under Code of Civil Procedure section 1021.5.[1] Plaintiffs successfully petitioned the trial court for a writ of mandate directing the City of Los Angeles (City) to revoke permits for a commercial parking lot located near two homes Plaintiffs own in the neighborhood. In denying private attorney general fees, the trial court determined Plaintiffs' private economic interest, as represented by the claimed diminution in the value of their property, was more than sufficient to justify their suit against the City, regardless of any public interest that the legal action also advanced. The court applied the correct legal standard and the evidence supports its conclusion. We find no abuse of discretion. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Real Party in Interest Triangle Center, LLC (Triangle Center) owns real property in the City that has been used for many years as a commercial parking lot. The parking lot serves a small strip mall and a 99 Cents Only retail store. Plaintiffs own and rent out two single family residences across the street from the parking lot. In 2009, one of Plaintiffs' tenants moved out due to the noise and lights from the business and parking lot.

In 2010, Plaintiffs filed an administrative appeal challenging a permit the City issued for the parking lot. The zoning administrator assigned to the appeal determined the department of building and safety erred in allowing the parking lot to operate under a nonconforming use theory. Triangle Center appealed the determination to the City's planning commission, arguing, among other things, the City was

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[1] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

" 'estopped from determining the 50 year use of the parking lot is not legal.' "

In February 2012, the planning commission reversed the zoning administrator. The commission determined the City was equitably estopped from requiring certificates of occupancy for the parking lot.

In May 2012, Plaintiffs filed a petition for a writ of mandate against the City and a complaint for damages against Triangle Center. The suit challenged the planning commission's determination and sought a permanent injunction and damages from Triangle Center for private nuisance. In support of the nuisance claim, Plaintiffs alleged the parking lot interfered with their free and comfortable use of their property, acted as a magnet for vagrants and criminals, and jeopardized the safety of residents on Plaintiffs' property.

In April 2013, the trial court granted the writ petition, concluding the evidence did not support the planning commission's equitable estoppel finding. On December 3, 2013, Plaintiffs dismissed their nuisance claim, and, on December 31, 2013, the trial court entered judgment, granting a peremptory writ of mandate directing the City to set aside the planning commission's decision. The City and Triangle Center filed a timely appeal from the judgment.

On December 5, 2013, Plaintiffs filed a separate nuisance action against Triangle Center, seeking an injunction, monetary damages, and restitution based on Triangle Center's operation of the parking lot. Plaintiffs alleged the parking lot violated the City's zoning code and "substantially and unreasonably interfered with the free and comfortable use and enjoyment" of their property, including "negatively affect[ing] Plaintiffs' rental income" and "reduc[ing] the value of Plaintiffs' Property."

In September 2014, Plaintiffs obtained two appraisals of their property. One appraisal determined the presence of the parking lot diminished the property's rental value by approximately $438,500. The other found the parking lot diminished the rental value by $352,458.

In May 2015, this court affirmed the trial court's judgment granting Plaintiffs' petition for a writ of mandate. We concluded the circumstances of the case did not justify an equitable estoppel and observed continued use of the property as a parking lot should be approved, if at all, through the planning and zoning process or on an application for a conditional use permit or a variance. (*Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1264-1266.) The City and Triangle Center petitioned the Supreme Court for review of the decision.

While the petitions for review were pending, Plaintiffs and Triangle Center agreed to settle their dispute. Under their settlement agreement, Triangle Center withdrew its petition for review and paid Plaintiffs $300,000 in exchange for Plaintiffs dismissing their nuisance action and granting Triangle Center a general release of claims.

Following the settlement with Triangle Center, Plaintiffs filed their motion for attorney fees under section 1021.5, seeking an award of $119,380.66 in fees from the City. The amount represented a fraction of the approximately $375,000 in total aggregate fees Plaintiffs claimed to have incurred in the original writ action and the subsequent nuisance action.[2] Plaintiffs

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[2] With respect to the writ action, Plaintiffs claimed they incurred $302,381.50 in legal fees and an additional $67,379.81 in "costs," totaling $369,761.31. Plaintiffs also claimed they incurred $73,800 in legal fees for the subsequent nuisance action against Triangle Center.

calculated the requested fee award by allocating half of Triangle Center's $300,000 settlement payment to the fees and "costs" incurred in the writ action ($369,761.31 - $150,000 = $219,761.31), then dividing the remainder in half for the City's claimed responsibility ($219,761.31 ÷ 2 = $109,880.66), and adding $9,500 for the estimated fees incurred to prepare the motion ($109,880.66 + $9,500 = $119,380.66). As part of their supporting evidence, Plaintiffs submitted the two appraisal reports they had obtained in September 2014. Plaintiffs characterized the diminished property value as a "cost" of the nuisance action against Triangle Center that was not fully recouped by the $300,000 settlement payment.

The trial court denied the attorney fee motion. Although it found private enforcement was necessary and Plaintiffs' action conferred a significant benefit on the general public, the court concluded the financial burden of enforcement did not transcend Plaintiffs' private interest in the outcome of the litigation. The court focused particularly on the claimed diminution in value to Plaintiffs' property, citing the appraisal reports Plaintiffs submitted with their fee motion: "The [Plaintiffs] claim between $352,000.00 and $438,000.00 in damages to their property value resulting from the parking lot [citation]. . . . Moreover, the [Plaintiffs] actually compromised their [nuisance] claim against [Triangle Center] for $300,000.00, indicating that the damages claims were not mere litigation posture [citation]." As Plaintiffs had incurred approximately $375,000 in aggregate total fees for the two actions, and "substantiated up to nearly $440,000 in damages" to their property from the unpermitted parking lot, the court reasoned "[t]he claimed property value damage would have

been sufficient to justify the [Plaintiffs'] litigation in their own right, absent the public interest."[3]

DISCUSSION

"[E]ligibility for section 1021.5 attorney fees is established when '(1) plaintiffs' action "has resulted in the enforcement of an important right affecting the public interest," (2) "a significant benefit, whether pecuniary or nonpecuniary has been conferred on the general public or a large class of persons," and (3) "the necessity and financial burden of private enforcement are such as to make the award appropriate." ' " (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214 (*Whitley*), quoting *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 935.) " '[Utilizing] its traditional equitable discretion,' [the trial] court 'must realistically assess the litigation and determine, from a practical perspective' [citation] whether or not the statutory criteria have been met." (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142; *Summit Media, LLC v. City of Los Angeles* (2015) 240 Cal.App.4th 171, 187 (*Summit Media*).)

There is no dispute that two of the three prerequisites for an award of fees under section 1021.5 have been met. The trial court found Plaintiffs' writ action resulted in the enforcement of an important right affecting the public interest and the action conferred a significant benefit on the general public. The dispute concerns whether the trial court abused its discretion when it concluded Plaintiffs failed to establish the third prerequisite—namely, that "the necessity and financial burden of

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[3] The $375,000 figure refers to the aggregate fees Plaintiffs incurred in the initial action against the City and Triangle Center and the subsequent nuisance action against Triangle Center only. (See fn. 2, *ante*.)

private enforcement . . . are such as to make the award appropriate." (§ 1021.5.)

In evaluating the element of financial burden, "the inquiry before the trial court [is] whether there were 'insufficient financial incentives to justify the litigation in economic terms.' " (*Summit Media, supra,* 240 Cal.App.4th at p. 193, quoting *Whitley, supra,* 50 Cal.4th at p. 1211.) If the plaintiff had a "personal financial stake" in the litigation "sufficient to warrant [the] decision to incur significant attorney fees and costs in the vigorous prosecution" of the lawsuit, an award under section 1021.5 is inappropriate. (*Summit Media,* at pp. 193-194; *Millview County Water Dist. v. State Water Resources Control Bd.* (2016) 4 Cal.App.5th 759, 768-769 (*Millview*); *Whitley,* at p. 1211 ["a litigant who has a financial interest in the litigation may be disqualified from obtaining such fees when expected or realized financial gains offset litigation costs"].) " 'Section 1021.5 was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest.' " (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1329 (*Davis*).) " 'Instead, its purpose is to provide some incentive for the plaintiff who acts as a true private attorney general, prosecuting a lawsuit that enforces an important public right and confers a significant benefit, despite the fact that his or her own financial stake in the outcome would not by itself constitute an adequate incentive to litigate.' " (*Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 635.)

" ' "An award on the 'private attorney general' theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.' [Citation.]" '

[Citation.] 'This requirement focuses on the financial burdens and incentives involved in bringing the lawsuit.' " (*Whitley, supra,* 50 Cal.4th at p. 1215.) "The relevant issue is ' " 'the estimated value of the case at the time the vital litigation decisions were being made.' " ' " (*Davis, supra,* 245 Cal.App.4th at p. 1330.)

"The burden is on the party requesting section 1021.5 fees to demonstrate all elements of the statute, including that the litigation costs transcend his or her personal interest. . . . 'The trial court's judgment on whether a plaintiff has proved each of the prerequisites for an award of attorney fees under section 1021.5 "will not be disturbed unless the appellate court is convinced that it is clearly wrong and constitutes an abuse of discretion." ' [Citation.] With respect to the issues of necessity and financial burden, the trial court abuses its discretion in making an award under section 1021.5 when there is no substantial evidence to support the required findings." (*Millview*, *supra,* 4 Cal.App.5th at p. 769.)

The trial court found the cost of Plaintiffs' legal victory was approximately $375,000 (the total aggregate legal fees incurred for the writ action and nuisance action), while Plaintiffs' personal stake in the litigation was approximately $440,000 (the diminished value of Plaintiffs' property attributable to the parking lot, according to Plaintiffs' appraiser). Because those costs did not transcend Plaintiffs' personal stake in the litigation, the court concluded Plaintiffs failed to meet their burden for establishing a right to attorney fees under section 1021.5.

Plaintiffs assert two claims of error—both are premised on an incorrect understanding of the financial burden analysis. First, Plaintiffs contend the court abused its discretion by "reject[ing], without explanation, the [Plaintiffs'] proposed allocation of their modest recovery across the two claims, which

showed a massive financial loss to the [Plaintiffs] on their action for writ of mandate." Second, Plaintiffs argue the court's finding was erroneous because "even under the trial court's aggregate formulation, whatever recovery [Plaintiffs] obtained in their concurrently filed nuisance action against the owners of the lot was more than wiped out by the aggregate legal fees for both causes of action, creating a $75,000 deficit."

Both contentions incorrectly presume the trial court was required to balance Plaintiffs' financial *recovery* against Plaintiffs' litigation costs in assessing section 1021.5's financial burden prong. Thus, with respect to Plaintiffs' "proposed allocation," Plaintiffs argue the $300,000 settlement from the nuisance action should be allocated against the costs of the two actions, resulting in a "financial loss" of approximately $220,000 from the writ action. Likewise, with respect to the trial court's "aggregate formulation," Plaintiffs maintain their total legal fees for the two actions ($375,000), when offset by their "recovery" from the nuisance action ($300,000), results in a "$75,000 deficit." Neither contention is consistent with the prescribed financial burden analysis, which " 'focuses on the financial burdens and *incentives* involved in *bringing* the lawsuit' " (*Whitley, supra,* 50 Cal.4th at p. 1215, italics added)—not the ultimate financial recovery obtained in the litigation.

Summit Media is instructive. In that case, the plaintiff, an outdoor advertising business, sued to invalidate a settlement agreement between the City of Los Angeles and several other competing billboard companies. (*Summit Media, supra,* 240 Cal.App.4th at pp. 175-176.) The agreement exempted the competitors from city regulations limiting their ability to modernize their billboards. Because the plaintiff was not a party to the settlement, its billboards would have remained subject to those regulations. (*Id.* at pp. 174-175.) After prevailing in its

action to invalidate the settlement, the plaintiff sought an award of attorney fees under section 1021.5, arguing it lacked a financial incentive to pursue the litigation because it had sought no damages or other economic recovery. (*Summit Media,* at pp. 181, 190.) The *Summit Media* court disagreed. In affirming the trial court's denial of fees, the court rejected the "dubious proposition that the absence of a monetary award necessarily equates to 'zero' financial benefits." (*Id.* at p. 192.) The court noted the plaintiff had alleged in earlier pleadings that the settlement would place it at a " 'competitive disadvantage,' " causing it to " 'suffer substantial loss of rents, profits and goodwill' " and putting its " 'economic survival' " in jeopardy. (*Id*. at pp. 188-189, italics omitted.) In view of the economic threat the settlement posed to the plaintiff's business, the *Summit Media* court found, "[t]he record supports the trial court's conclusion that plaintiff had a personal financial stake in this litigation that was sufficient to warrant its decision to incur significant attorney fees and costs in the vigorous prosecution of this lawsuit." (*Id.* at pp. 193-194.)

Similarly, in *Children & Families Com. of Fresno County v. Brown* (2014) 228 Cal.App.4th 45 (*Fresno*), the court concluded an award of section 1021.5 attorney fees was not warranted because, although the plaintiff recovered nothing from the action, it stood to lose millions of dollars in funding if its lawsuit was unsuccessful. (*Fresno*, at p. 58 [observing the "amount saved was more than 80 times the amount of attorney fees expended"].) As the *Fresno* court explained, "[t]he benefit to be obtained from this litigation was pecuniary, namely the preservation of money, even if that pecuniary benefit did not come in the form of money damages." (*Id*. at p. 60.)

Contrary to Plaintiffs' premise, *Summit Media* and *Fresno* recognize the amount of a plaintiff's financial *recovery* is not

dispositive; rather, the proper focus of the financial burden requirement is the "financial incentives" that induce a plaintiff to bring suit. (See also *Millview, supra,* 4 Cal.App.5th at p. 772 [rejecting contention that "financial burden analysis is concerned only with the actual financial recovery of a party from the litigation," observing contention is "inconsistent with more recent authorities, which . . . consider a party's financial *incentives* to participate in litigation"]; *Davis, supra,* 245 Cal.App.4th at p. 1330 [relevant issue is the estimated value of the case when litigation decisions are made].) The trial court applied the correct legal standard in assessing the requirement.

The trial court recognized Plaintiffs' financial incentive for bringing the writ action was the diminution in value the parking lot caused to Plaintiffs' property—a financial harm that would be avoided by compelling the City to revoke the permit granted to Triangle Center. Because the financial harm to be avoided ($440,000) exceeded the combined cost of pursuing both the writ action and the nuisance action ($375,000), substantial evidence supports the court's conclusion that the financial burden of the suit did not transcend Plaintiffs' financial interest in bringing the litigation. The trial court did not abuse its discretion.

DISPOSITION

The order is affirmed. The City of Los Angeles is entitled to its costs, if any.

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EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.